IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.154 OF 2003
IN
SESSIONS CASE NO.92 OF 1998
AND
SESSIONS CASE NO.1183 OF 1998

1.Shahadat Hussain Rehmat Hussain
alias Kallu Kanpuri,

2.Rambhavan Shriram Gulam Verma
@ Sonar

(at present both lodged at Arthur Road Central Prison, Mumbai) ...Appellants Accd.Nos.1 & 2

Versus

The State of Maharashtra,
(at the instance of Tardeo Police Station, Mumbai,
C.R.No.241/1996) ...Respondent

.....

Mr.Arfan Sait as amicus curiae for Appellants.

Mr.K.V.Saste, A.P.P. for Respondent.

.....

CORAM: A.M.KHANWILKAR, J.

FEBRUARY 8, 2007.

ORAL JUDGMENT :

1. This Appeal by accused Nos.1 and 2 respectively take exception to the Judgment and

order passed by the First Additional Principal Judge and Additional Sessions Judge, Greater Bombay dated 19th/21st/22nd October 2002 in Sessions Case No.92 of 1998. The Appellants have been found guilty of offence punishable under Sections 392 r/w 34, 397 r/w 34 and 452 r/w 34 of the Indian Penal Code, 1860 (hereinafter referred to as 'the I.P.C.) Insofar as offence punishable under Sections 392 r/w 34 and 397 r/w 34 are concerned, the Appellants have been directed to undergo rigorous imprisonment for a period of seven years on each count and also to pay fine. Insofar as offence under Section 452 r/w 34 is concerned, the Appellants are directed to suffer rigorous imprisonment for three years and also to pay fine.

2. This order of conviction and sentence is subject matter of challenge in the present Appeal. The Appeal was originally presented through Advocate. However, later on the Advocate took discharge, as a result, notices were sent to the Appellants before proceeding with the hearing of the Appeal. From the service report, it transpired that Appellant No.1 was still in jail. He, in

turn, requested to provide legal assistance. Whereas, Appellant No.2 has already been released from jail after having completed the sentence awarded by the lower Court in relation to the present offence and was not available on the known address. In this backdrop, this Court appointed Mr.Arfan Sait to espouse the cause of the Appellants as amicus curiae.

3. The prosecution case is that on 21st August 1996, Behram Hemawant Namdariya (PW 1) and his wife Homai (PW 2) were in their residence Flat No.8 on the fourth floor of Sonawala Building No.A, Tardeo Circle, Mumbai - 400 007. At about 9.30 a.m., the door bell of the house rang. The said Behram (PW 1), thinking that maid servant had arrived, opened the door without ascertaining as to who was on the other side of the door. As soon as he opened the door, it is alleged that four unknown persons rushed into his house and closed the door. One of them told him that they were Income-Tax Officers and have come to raid his house. It is alleged that when Behram (PW 1) demanded the Identity Card from the intruders, one of them took

out a revolver from his pant's pocket and placed it on the temple of PW 1. It is stated that on hearing this commotion, Humai (PW 2) who was in the bedroom, came to the main hall. Another person amongst the four intruders took out revolver and placed it on the temple of PW 2 and threatened her that she would be shot, if she raised any alarm. The said persons demanded keys of the cupboard and took both PW 1 and PW 2 inside the bedroom. The two intruders continued to hold the revolver on the temple of PW 1 and PW 2. The other two persons removed cash and ornaments from the cupboard. The other two persons were wielding daggers in their hands. It is alleged that while the said persons were about to leave, PW 1 demanded receipt, as the persons had represented themselves as Income-Tax Officers. It is stated that the said persons told Behram that he may prepare the receipt. It is alleged that when PW 2 started writing down on a piece of paper, one of the four persons snatched the paper and signed it in the name of Rajan Mane and told them to contact on the telephone number noted on the paper. Thereafter, all the four persons left the flat with the cash, gold and other

valuables worth Rs.3,10,200/- (Rupees Three Lakhs Two Hundred) and while leaving, they bolted the door from outside. This incident, it is alleged lasted between 9.45 a.m. to 10.30 a.m. It is stated that PW 1 in the evening, at about 7.45 p.m. on the same day went to Tardeo Police Station and narrated the incident to PSI Eknath Genba Pawar (PW 7). PW 7, in turn, recorded the statement of PW 1, which is noted as First Information Report (F.I.R.) (Exhibit 10) and registered offence vide C.R.No. 241-96 under Sections 452, 170, 392 r/w 34 of the I.P.C. as well as provisions of Indian Arms Act. PW 7 thereafter visited the place of occurrence namely the residential flat of PW 1 along with panch witness PW 5 and prepared spot panchnama. It is not necessary to refer to other details. Suffice it to observe that after investigation was completed, charge-sheet was filed. As the offence was triable by the Sessions Court, the matter was remitted to the Sessions Court and registered as Sessions Case No.92 of 1998. It is stated that while the said case was pending, accused No.3 came to be arrested in connection with the incident in question and after investigation was completed,

supplementary charge-sheet was filed against accused No.3. That case was also committed and heard along with the sessions case pending against Appellants/accused Nos.1 and 2. The same was numbered as Sessions Case No.1183 of 1998. The fourth accused, however, could not be nabbed and has remained absconding.

4. The prosecution has mainly relied on the evidence of two eye-witnesses PW 1 and PW 2 about the actual incident. The prosecution also examined the panch witnesses PW 5 and PW 6 as well as the Special Executive Magistrates (PW 3 and PW 4), who conducted the test identification parade in relation to accused Nos.1 and 2 and accused No.3 respectively. The prosecution also relied on the evidence of police officials PW 7 and PW 8. On analysing the ocular as well as the documentary evidence adduced by the prosecution, the Trial Court proceeded to record finding of guilt against the Appellants/accused Nos.1 and 2 only in respect of offence punishable under Sections 392 r/w 34, 397 r/w 34 and 452 r/w 34 respectively.

5. Insofar as accused No.3 is concerned, the Trial Court has acquitted the said accused of all the charges. No appeal has been preferred by the State questioning the correctness of that Judgment. In this Judgement, therefore, I am not called upon to consider the case against accused No.3 or for that matter to consider the correctness of the finding recorded by the Trial Court acquitting the Appellants/accused of other charges. The Trial Court, in the first place, has accepted the evidence of PW 1 and PW 2 as trustworthy and reliable to proceed against the Appellants/accused Nos.1 and 2, inspite of the discrepancies and embellishments in their evidence. The Trial Court has noted that the main stand of the Appellants was that the prosecution evidence did not establish beyond reasonable doubt, the involvement of the Appellants/accused Nos.1 and 2 in the commission of the offence as the test identification parade was of no value. Left with that situation, there was no material to corroborate the prosecution version about the complicity of the Appellants in the commission of the offence. The Trial Court has addressed to this plea of the Appellants and

negatived the same. The Trial Court on analysing the evidence as a whole, took the view that the version of PW 1 and PW 2 was trustworthy and reliable and would clearly indicate complicity of the Appellants/accused Nos.1 and 2 in the commission of the crime. On that reasoning, the Trial Court proceeded to hold that even if the test identification parade was to be ignored, it would make no difference in the fact situation of the present case. The Trial Court has taken into account the spot panchanama proved by independent panch PW 5 to hold that the spot panchnama and the evidence of PW 5 would corroborate the case made out by PW 1 and PW 2 about the incident having occurred on the relevant date which would corroborate their version. The Trial Court has also relied on the dock identification parade of Appellants/accused Nos.1 and 2 during the trial. Essentially, on the above basis, the Trial Court proceeded to record finding of guilt against the Appellants.

6. In the present Appeal, it is argued on behalf of the Appellants that the prosecution

evidence fell short of bringing home guilt against the Appellants beyond reasonable doubt. In any case, the Appellants deserve to be given benefit of doubt. According to the Appellants, there was unexplained delay in registering F.I.R. The incident in question is stated to have occurred in the morning at about 9.30 a.m. whereas, the F.I.R. is registered in the evening after 7.30 p.m. Besides, there was improvement in the evidence of PW 1 and PW 2 on material points. Further, the test identification parade having been rightly discarded by the Trial Court, the Appellants deserve benefit of doubt as the dock identification of Appellants has been done after over five years. It is submitted that it is not the prosecution case that any injury was caused to any of the prosecution witnesses, nor any weapon or article was recovered. Moreover, there was material discrepancy about the description of the clothes worn by the accused as given in the F.I.R. and as given in the evidence. It is also argued that the Trial Court having acquitted the Appellants of charge of impersonation as posing themselves to be the Income-Tax Officers, the theory of the entry of

the Appellants in the flat itself becomes doubtful. It is then contended that for the reason accused No.3 has been acquitted, on the same basis, benefit ought to have been given to accused Nos.1 and 2 while weighing the evidence of the same prosecution witnesses who have spoken against the Appellants/accused Nos.1 and 2. It is also contended that there is discrepancy in the evidence about bolting of door from outside by the accused while leaving the flat and the name of neighbour who opened the door disclosed by the prosecution witnesses, having not been examined, was fatal. It is submitted that it is unusual that accused No.1 would lead to the place of offence within the meaning of Section 27 of the Evidence Act. It is lastly submitted that accused No.2 has already suffered the sentence awarded by the Trial Court. Insofar as accused No.1 is concerned, the sentence awarded to accused No.1 should run concurrently with the sentence awarded to him in respect of other sessions cases being Sessions Case No.504 of 1997 (for offences under Sections 396, 449 and 324 of I.P.C.) and Sessions Case No.579/97 (for offence under Sections 396, 449 and 324 of the I.P.C.).

7. The Public Prosecutor on the other hand, supports the view taken by the Trial Court and would submit that the view so taken is not only a possible view, but the only inevitable conclusion to be reached in the fact situation of the present case. The Assistant Public Prosecutor has supported the finding and conclusion reached by the lower Court and pressed that the Appeal be dismissed being devoid of merits.

8. Having considered the rival submissions and going through the materials on record, I have no hesitation in affirming the conclusion reached by the Trial Court in recording finding of guilt against the Appellants for offences punishable under Sections 392, 397 and 452 r/w 34 of the I.P.C. Indeed, the prosecution has relied only on evidence of PW 1 and PW 2 to establish complicity of the Appellants in the commission of the offence. PW 1 and PW 2 were the only persons who have witnessed the incident and were victims at the hands of the Appellants and two others. Insofar as the occurrence of incident is concerned, the

evidence of PW 1 and PW 2 is not only consistent but would corroborate on material points. The Trial Court, on careful analysis of the said evidence and after taking into account the criticism of omissions and contradictions found in their evidence, has rightly proceeded to hold that their evidence was trustworthy and reliable. The discrepancies and embellishments found in their evidence were insignificant and did not affect the material evidence regarding the actual incident and the involvement of the Appellants as such.

9. We shall now examine the evidence of PW 1 and PW 2. PW 1 in his examination-in-chief has given the manner in which the incident occurred on 21st August 1996. He has deposed that he opened the door after the door bell rang. He saw two persons on the door. He has identified those two persons as accused Nos.1 and accused No.2/ Appellants herein. He has given the description of the clothes worn by those persons. He has further stated that accused No.1 represented that they were Income-tax Officers and have come to raid the flat. When he called upon them to show their Identity

Card, accused No.1 took out the revolver and put its barrel on his temple. Thereafter, both accused Nos.1 and 2 entered his flat and took him and his wife in the bedroom. He then stated that accused Nos.1 and 2 were then joined by two more persons. He has further deposed the role played by accused Nos.1 and 2. Accused No.1 put the revolver on the temple of his wife (PW 2) and accused No.1 put the revolver inside his mouth. He has stated that both the Appellants/accused Nos.1 and 2 threatened him as well as his wife and told them not to shout. He has then stated that two other associates accompanying the accused Nos.1 and 2 removed the cash of Rs.1,21,500/- (Rupees One Lakh Twenty-one Thousand Five Hundred), golden earrings (four pairs) and other items (details whereof are given in his evidence). He has then deposed that the accused persons took away all those cash and valuable items and while going away, bolted the door from outside. He has also deposed that while the accused were inside the house, had cut out the telephone lines. He has then deposed that after the Appellants/accused had left the flat, he raised shouts for help and his neighbour rescued them from

the flat by opening the door from outside. Insofar as the version about the actual incident and the involvement of Appellants/accused Nos.1 and 2 is concerned, nothing has come in the cross-examination, so as to doubt the truthfulness thereof. In the cross-examination, as is rightly noted by the Trial Court, the Advocate for the accused No.2 has succeeded in bringing on record the omissions and contradictions noted by the Trial Court in Paragraph 15. However, said omissions or contradictions being insignificant, are not sufficient to doubt the veracity of the version given by PW 1. In any case, the said omissions or contradictions, in no way, were directed to doubt the claim of PW 1 of having identified accused No.1 and accused No.2 in the dock, albeit, after five years. Even this aspect has been considered by the Trial Court. It is seen that the prosecution witnesses PW 1 and PW 2 had opportunity to closely see the accused persons for sufficiently long time as they were inside the flat for almost over thirty minutes and in their close proximity. They had sufficient opportunity to notice their identity. The only suggestion put to this witness (PW 1) with

regard to identification in the dock is that he had done so at the instance of the police, which suggestion has been denied. It is the case of PW 2 that she also had occasion to closely watch the developments for over thirty minutes. She has deposed having seen accused Nos.1, 2 and 3 taking part in the crime. She has ascribed specific role to accused No.1 and accused No.2/Appellants herein. She has spoken about the fact that accused No.1 and accused No.2 were holding revolvers in their hands; and at the point of revolver, she and her husband were robbed. PW 2 claims to have attended test identification parade and identified accused Nos.1 and 2 in the test identification parade. However, the Trial Court has discarded the prosecution evidence regarding test identification parade for the reason that there was opportunity to the witness to see the accused standing behind the wall as the height of the wall was hardly 2′ 6". Besides, there were contradictions in the version of PW 1, PW 2 and PW 3 about the manner in reaching the venue. I am not elaborating on this aspect in the present Judgement, as I am inclined to affirm the conclusion reached by the Trial Court on the

basis of other evidence which clearly establishes the complicity of the Appellants/accused Nos.1 and 2 in the commission of the crime beyond reasonable doubt. PW 2 has been extensively cross-examined, however, the cross-examination is mainly on the identification of the accused in the test identification parade. There is no cross-examination in relation to the evidence given by PW 2 of the actual incident. There is only suggestion given by accused No.1 that no incident took place and that she was not present in the house on the date of incident. It is suggested to her that she had identified accused No.1 in Court at the instance of the police. These suggestions have been denied by PW 2. Even the cross-examination at the instance of accused No.2, does not affect the truthfulness and reliability of the version of PW 2 in relation to the actual incident. She has spoken about the occurrence of the actual incident and time of occurrence as well as involvement of accused Nos.1 and 2 is corroborated from the version of PW 2 as well as the spot panchanama. Even PW 2 besides identifying accused Nos.1 and 2 during the test identification parade has

identified them in dock during the trial. Insofar as accused No.1 is concerned, she has broadly described about his physique. She has stated that he was about 5’ 11" to 6’ and dark brown in colour. He was between age group of 28 to 35. As mentioned earlier, as this witness had opportunity to watch the accused persons closely for sufficiently long time about thirty minutes and from close distance, the dock identification of the accused at the instance of these witnesses cannot be brushed aside lightly. True it is, that the evidence regarding participation of this witness in the test identification parade has been held to be of no value, that however, would not affect the credentials of this witness about her version regarding the actual incident and about the role played by each of the accused in the incident. Merely because the authorities (police as well as Special Executive Magistrate) had faltered in ensuring proper test identification parade, that cannot be the basis to completely throw out the version of PW 1 and PW 2 which is the substantive evidence and more so, when the same is trustworthy and reliable. There is nothing in the

cross-examination, not even any suggestion given as to why these witnesses PW 1 and 2 would falsely implicate accused Nos.1 and 2 in the commission of the crime. On this finding, the conclusion reached by the Trial Court about the involvement of the Appellants will have to be affirmed.

10. To get over this, Counsel for the Appellants would contend that there is unexplained delay in registering the F.I.R. The argument though attractive, will have to be rejected. The Trial Court has considered this contention in Paragraph 34 of the Judgment. The Trial Court has rightly noted that nothing has been brought on record in cross-examination of PW 1 and PW 2 that they had concocted a false version to fabricate a case against the accused by taking so much time in approaching the police. The view taken by the Trial Court on analysing the evidence of PW 1 and PW 2 is a possible view. Merely because some time has been spent in reporting the matter to the police, does not affect the substantive evidence which has come on record regarding the involvement of the Appellants in the commission of the crime.

That having remained unshaken, delay of few hours in reporting the matter to the police, cannot be basis to lightly brush aside the prosecution case moreso in absence of cross-examination on the point that the version of these prosecution witnesses was false version and a fabricated case to falsely implicate the Appellants. The Trial Court has also adverted to two decisions of the Apex Court in the case of *State of Haryana v. Ram Sarup* decided on 9th April 2002 in Criminal Appeal No.21 of 1994 and *Bhagwan Singh v. State of Madhya Pradesh reported in (2002) 4 SCC 85* to reject the stand taken on behalf of the Appellants. That view being possible view, no interference is warranted on the basis of the argument under consideration.

11. Counsel for the Appellants had argued that the evidence of PW 1 and PW 2 was not sufficient to record finding of guilt against the Appellants. Instead, in view of the omissions and contradictions in the evidence of these witnesses, the Appellants ought to be given benefit of doubt. Even this argument does not commend to me. The Trial Court has analysed the evidence of PW 1 and

PW 2 threadbare and has concluded that the same was trustworthy and reliable one. The so-called omissions and contradictions noticed in the evidence were minor discrepancies or embellishments which in any case were insignificant. Insofar as the actual incident and the involvement of the Appellants in that incident are concerned, that evidence of PW 1 and PW 2 has remained unshaken. The view so taken by the Trial Court is a possible view. To reassure myself, the evidence of these witnesses was analysed and I see no reason to depart from the conclusion so reached by the Trial Court.

12. It was contended that the Trial Court having disregarded the evidence regarding test identification parade, ought not to have recorded finding of guilt against the Appellants on the basis of dock identification done by PW 1 and also by PW 2. It was argued that having regard to the importance of conducting test identification parade, the Appellants deserved benefit of doubt. It was argued that in absence of evidence of identity of the accused in the test identification

parade, the prosecution case cannot succeed. For considering the argument on the point of effect of discarding the evidence regarding test identification parade, we shall straightaway refer to the decision of the Apex Court in the case of **Suraj Pal v. State of Haryana reported in (1995) 2 SCC 64**. In Para 14 of this decision, the Apex Court has noted the object, purpose and importance of the test identification parade. The Apex court has observed thus :

> "14. Before dealing with the various contentions advanced by the learned counsel for the appellants as referred to above, we shall first state the object, purpose and importance of the test identification parade. It may be pointed out that the holding of identification parades has been in vogue since long in the past with a view to determine whether an unknown person accused of an offence is really the culprit or not, to be identified as such by those who claimed to be the eye-witnesses of the occurrence so that they would be able to identify the culprit if produced before them by recalling the impressions of his features left on their mind. That being so, in the very nature of things, the identification parade in such cases serves a dual purpose. It enables the investigating agency to ascertain the correctness or otherwise of the claim of those witnesses who claimed to have seen the offender of the crime as well as their capacity to

> identify him and on the other hand it saves the suspect from the sudden risk of being identified in the dock by such witnesses during the course of the trial. This practice of test identification as a mode of identifying an unknown person charged of an offence is an age-old method and it has worked well for the past several decades as a satisfactory mode and a well-founded method of criminal jurisprudence. It may also be noted that the substantive evidence of identifying witness is his evidence made in the court but in cases where the accused person is not known to the witnesses from before who claimed to have seen the incident, in that event identification of the accused at the earliest possible opportunity after the occurrence by such witnesses is of vital importance with a view to avoid the chance of his memory fading away by the time he is examined in the court after some lapse of time."

13. However, the Assistant Public Prosecutor has justly relied on the decisions of the Apex Court in the case of **Shriram v. The State of U.P. reported in AIR 1975 SC 175.** In that case, the accused had offered himself for being identified in an identification parade. The Public Prosecutor, however, objected to that request and that objection was upheld by the Magistrate. As a consequence, no parade was conducted. In this backdrop, it was argued on behalf of the accused that inspite of his willingness to participate in

identification parade, if no parade was conducted, he ought to be given benefit thereof. This plea was rejected by the High Court as inconsequential by observing that the oral testimony of the witnesses, even if not tested by holding an identification parade, can be made the basis of conviction. After noticing this position, in Para 11 of the reported Judgment, the Apex Court expounded the statement of law, which reads thus :

> "It is correct to say that no rule of law requires that the oral testimony of a witness should be corroborated by evidence of identification. In fact, evidence of identification is itself a weak type of evidence. But the point of the matter is that the court which acquitted Shri Ram was justifiably influenced by the consideration that though at the earliest stage he had asked that an identification parade be held, the demand was opposed by the prosecution and the parade was therefore not held."

14. My attention is also invited to the recent decision of the Apex Court in the case of **Daya Singh v. State of Haryana reported in 2001 SC 1188**. In Para 11 of this decision, the Apex Court has referred to the statement of law expounded in

the earlier reported cases to the effect that the evidence of identification merely corroborates and strengthens the oral testimony in Court which alone is the primary and substantive evidence as to identity. Further, the purpose of test identification is to test that evidence, the safe rule being that the sworn testimony of the witness in Court as to the identity of the accused who is a stranger to him, as a general rule, requires corroboration in the form of an earlier identification proceeding. The Apex Court has restated the legal position that -

> "....It may be remembered that the substantive evidence of a witness is his evidence in Court, but when the accused person is not previously known to the witness concerned then identification of the accused by the witness soon after the former's arrest is of vital importance because it furnishes to the investigating agency an assurance that the investigation is proceeding on right lines in addition to furnishing corroboration of the evidence to be given by the witness later in Court at the trial....."

. In Paragraph 12 of the reported decision, the Apex Court has observed thus:

"12. .....For this purpose, it is to be borne in mind that purpose of test identification is to have corroboration to the evidence of the eye-witnesses in the form of earlier identification and that substantive evidence of a witness is the evidence in the Court. If that evidence is found to be reliable then absence of corroboration by test identification would not be in any way material. Further, where reasons for gaining an enduring impress of the identity on the mind and memory of the witnesses are brought on record, it is no use to magnify the theoretical possibilities and arrive at conclusion - what in present day social environment infested by terrorism is really unimportant. In such cases, not holding of identification parade is not fatal to the prosecution. The purpose of identification parade is succinctly stated by this Court in State of Maharashtra v. Suresh, (2000) 1 SCC 471 as under :

"We remind ourselves that identification parades are not primarily meant for the Court. They are meant for investigation purposes. the object of conducting a test identification parade is twofold. First is to enable the witnesses to satisfy themselves that the prisoner whom they suspect is really the one who was seen by them in connection with the commission of the crime. Second is to satisfy the investigating authorities that the suspect is the real person who the witnesses had seen in connection with the said occurrence." (emphasis supplied)

. In Paragraph 14 in the case of **Daya Singh (supra)**, the Apex Court has adverted to the extracts from Professor Borchards relied by the

Counsel for the accused and then proceeded to hold as under :

> ".... However, the learned counsel for the appellant, Mr.Lalit referred the say as noted by Professor Borchard's - "the emotional balance of the victim or eye-witness is so disturbed by his extraordinary experience that his powers of perception become distorted and his identification is untrustworthy....". It is true that PWs-37 and 38 have lost their son, daughter-in-law and son of brother-in-law and that it was extraordinary experience for them to be assaulted by terrorists. But, it would be difficult to hold that at that time, they had lost their power of perception. Theoretically in some cases what has been noted by the learned author may be true. For that purpose, the evidence of the witness is required to be appreciated with extra care and caution. But, where evidence is cogent, consistent and without any motive, it is no use to imagine and magnify theoretical possibilities with regard to the state of mind of the witnesses and with regard to their power of memorizing the identity of the assailants. Power of perception and memorising differs from man to man and also depends upon situation. It also depends upon capacity to recapitulate what has been seen earlier. But that would depend upon the strength or trustworthiness of the witnesses who have identified the accused in the Court earlier. Further in the present case, identification in the Court was out of 14 persons. That itself would lend credence to identification by the witnesses. For this purpose, learned Judge has rightly observed to the effect that physical features of accused must have been embedded in the memory of Jaswant Kaur.

> From the evidence and the cross-examination of these two witnesses, it is apparent that they gained enduring impression of the identity of the accused during the incident. Therefore, delay in trial by the Designated Judge for one reason or the other and thereafter identification of the accused in the Court after seven or eight years would not affect the evidence of these two witnesses....." (emphasis supplied)

. The position stated in the case of **Daya Singh (supra)** would apply on all fours to the case on hand.

15. In the present case, the prosecution witnesses had occasion to observe the Appellants/accused from close distance for over thirty minutes. The prosecution witnesses have given the description of the accused and have ascribed role to each of the accused in the commission of the offence. If the prosecution could succeed in establishing the complicity of the accused in the commission of the crime on the basis of substantive evidence of the witnesses without conducting test identification parade, logically it would follow that merely some flaw or lapse of the prosecution in the conduct of the test

identification parade may not be fatal; especially, where the evidence of prosecution witnesses is trustworthy and reliable and also corroborated by other evidence. Interestingly, there is nothing in the cross-examination of either PW 1 or PW 2 to suggest that they had lost their power of perception and memorising the events as unfolded at the relevant time, much less, to identify the Appellants/accused.

16. Assistant Public Prosecutor has also invited my attention to the decision in the case of **Jayawant Dattatray Suryarao v. State of Maharashtra reported in AIR 2002 SC 143.** While dealing with similar contention in Paras 54 to 56, the Apex Court answered the same in the following words:

> "54. Next question is whether identification of A-6 by PW9 in test identification parade and in the dock could be relied upon for convicting him. For appreciating this contention it is to be stated that witness has specifically mentioned that A-6 was around 5’8" in height and having fair complexion and was well built. Same is the version of PW 12 Laxman Vishe and PW 26 Ramesh Patil who had seen A-6 while sitting in the car of

A-2 on 12th and 14th.

55. Apart from the contradictions here and there, learned counsel appearing for A-6 vehemently submitted that no reliance can be placed upon the identification of A-6 by this witness because the incident of firing must have happened within few minutes and in that set of circumstances it is difficult for a witness to identify the person who fired shots. It is also contended that the test identification parade held on 22-10-1993 i.e. after more than one year, cannot be relied upon as corroborative evidence.

56. No doubt, it is true that incident of firing must have happened within few minutes, at the same time, it is the say of PW 9 tat he saw A-6 thrice - once, when he tried to come in the room from southern gate and finally when he entered the room and fired northern gage, again when he came from shots indiscriminately. Further, considering the nature of duty of a police constable, there is no reason to doubt his statement. We would also re-iterate that substantive evidence of a witness is his evidence in Court. Identification parade is not primarily meant for the court but is meant for investigation purposes. It serves two purposes, namely, to enable the witness to satisfy that prisoner whom he suspects is really the one who was seen by him in connection with the commission of the crime and for satisfying the investigating authority that suspect is the real person whom the witness had seen in connection with the said occurrence. In case when the evidence is cogent, consistent and without any motive, it is no use to theoretically imagine that as the witness has seen the accused for few minutes it would be difficult for him to identify. It always depends upon one’s capacity to recapitulate what he has seen earlier.

> power of perception and memorising differs from man to man and also depends upon situation. Finally, appreciation of such evidence would depend upon the strength and trustworthiness of witness. [Re: Rameshwar Singh v. State of J & K. [AIR 1972 SC 102]. Suraj Pal v. State of Haryana [(2002) 3 SCC 168]. In the present case, as stated, PW 9 was the police constable who was present in the room, he was injured, he saw accused No.6 coming in the room thrice and firing indiscriminately and hence, there is no reason to doubt identification by him."
>
> (emphasis supplied)

17. Reliance is lastly placed on the decision of this Court in **Madhukar Damu Patil v. State of Maharashtra reported in 1997 (1) Mh.L.J. 581.** This Court rejected the argument that it would not be safe to accept the evidence of the prosecution witnesses in absence of his participation in the identification parade. This Court while referring to the decisions of the Supreme Court has noted thus:

> "14. I now propose considering each of the aforesaid submissions. To back up his first submission, namely that in the absence of any test identification of the appellant, it would not be safe to accept his identification in the Court by P.W.1 Sumanbai Borase, P.W.2 Ramesh Patil and P.W. 3 Magan Bari. Mr.More placed reliance on two decisions of Supreme Court

reported in AIR 1983 SC 367, Mohd.Abdul Hafiq vs. State of Andhra Pradesh and AIR 1992 SC 2100, State of Maharashtra vs. Sukhdev Singh and another. The facts found in the aforesaid two cases are distinguishable from those of the present case and none of those decisions would have any application in the present case.

The case reported in AIR 1983 SC 367 (supra) was one of robbery and in that case, neither the test identification of the accused person who was not known to the victim prior to the incident was done and neither the victim gave any description of the accused in the FIR. It was in such a situation that the Supreme Court refused to attach any weight to the evidence of identification of the accused person by the victim in the Court. This decision has no application to the facts of the present case because here we find that in the FIR itself, the informant has given description of the appellant.

Further, in broad day light for a very long time, she was with the appellant and thus had plenty of time to recognise his features etc.

The decision reported in AIR 1992 SC 2100 (supra), is also distinguishable because, in the aforesaid decision. Their Lordships of the Apex Court held that the trial Court was justified in rejecting the identification of an accused for the first time in the Court by the witnesses because, they only had a fleeting glimpse of the accused during the time of the incident; they had no particular reason to remember the accused, and the evidence was that accused persons had changed their appearance (earlier they were clean shaven later they were attired like Sikhs). This is not the case here. Here the informant Sumanbai Borase and Ramesh Patil P.W.2, particularly the former had all the time

in the world to recognise the appellant during the incident and Sumanbai Borase had a particular reason to remember the appellant because he had removed the gold ornaments from her neck.

15. It needs to be emphasised that there is no immutable proposition of law or of practice having universal application to all cases that it is imperative to hold test identification of accused persons who are not known to the witnesses prior to the test identification and the absence to do so would vitiate the evidence of identification of the accused persons by the witnesses, for the first time in the Court. Whether weightage should be given to the evidence of identification of witnesses who have identified the accused for the first time in court is a question of fact and no strait jacket formula applicable to all cases can be laid down. It would all depend on the facts peculiar to each case.

16. Having said this, let me make it clear that it is always preferable and fair for the prosecution to have the test identification done during the course of the investigation itself because then the memory of the witnesses is fresh and if they identify an accused person, it given tremendous reassurance to the Court and enhances the value of the identification in court. A greater value and weightage is always attached by Courts to such an identification. Absence of test identification during the course of investigation certainly detracts from the value to be attached to the evidence of identification for the first time in the Court. As a result of this the loser is the prosecution and it should squarely blame itself for the same.

In this connection, it would be useful to refer to some of the observations made by

> Their Lordships of the Apex Court in the decision reported in AIR 1958 SC 350, Kantaprasad vs. Delhi Administration. In paragraph 5, Their Lordships have observed thus:-
>
> "As for the test identification parade, it is true that no test identification parade was held. The appellants were known to the police officials, who had deposed against the appellants and the only persons who did not know them before were the persons who gave evidence of association, to which the High Court did not attach much importance. It would no doubt have been prudent to hold a test identification parade with respect to witnesses who did not know the accused before the occurrence but failure to hold such a parade would not make inadmissible the evidence of identification in Court. The weight to be attached to such identification would be a matter for the courts of fact and it is not for this Court to reassess the evidence unless exceptional grounds were established necessitating such a course."
>
> (emphasis supplied)

18. In the present case, PW 1 has not participated in the identification parade. However, he has identified both accused Nos.1 2/Appellants herein in dock. The basis for identification by PW 1 in dock has not been challenged by the accused in the cross-examination, except, suggestion given to PW 1 that he had identified these accused at the instance of the police, which suggestion has been denied by PW 1.

In such a case, the substantive evidence on the point of incident and the involvement of the Appellants in the commission of the offence given by PW 1 having been held to be truthful and reliable one, the Trial Court rightly proceeded to record finding of guilt against the Appellants.

19. Insofar as PW 2 is concerned, she has also given graphic description about the manner in which incident took place and the involvement of the Appellants/accused Nos.1 and 2 in the commission of the offence. That version has remained unshaken. The evidence of PW 2 is corroborated not only by the version of PW 1 but also by other evidence including spot panchnama. Thus understood, merely because the evidence regarding test identification parade in which PW 2 had identified accused Nos.1 and 2 was to be discarded on account of flaws committed by the Officers (Police Officials and Special Executive Magistrate), the version of the prosecution witness who is the eye-witness, cannot be lightly brushed aside. The identification by PW 2 of accused No.1 and accused No.2 in dock, albeit, after five years will have to be taken into

account. There is absolutely no cross-examination regarding the identification in dock by PW 2 except suggestion given that it was done at the instance of the police, which has been denied. As is mentioned earlier, both PW 1 and PW 2 had opportunity to closely observe the Appellants/accused Nos.1 and 2 for over thirty minutes. They have given description of the accused as well as specific role played by them in the commission of the crime. Taking overall view of the matter, the version of PW 1 and PW 2 ought to prevail. Thus understood, there is no infirmity in the ultimate conclusion reached by the Trial Court in recording finding of guilt against the Appellants.

20. It was next contended that no injury is caused to any of the witnesses nor any weapons or articles are recovered. Even this argument has been considered by the Trial Court in paragraphs 35 and 36 of the Judgment. Recovery of weapon or articles would be useful only to corroborate the substantive evidence. Merely in absence of recovery, the substantive evidence cannot be

totally brushed aside. The substantive evidence having remained unshaken and unchallenged, the Appellants cannot succeed with the argument that they deserve benefit of doubt. The question of giving benefit of doubt would arise only if the Court was not certain about the involvement of the Appellants in the commission of the crime or the evidence on record paved way for some doubt in that behalf. Nothing of this sort has happened in the present case. This argument, therefore, does not take the matter any further. Other arguments including that benefit given to Accused No.3 on the basis of the same evidence, even the present Appellants deserved same treatment, will have to be stated to be rejected. For, the Trial Court has rightly distinguished the case against the Appellants/accused against whom there was clinching and unassailable evidence of their complicity in the commission of crime. In such a case, the question of giving benefit of doubt to the Appellants is unacceptable.

21. That takes me to the last submission made on behalf of the Appellants, especially Appellant

No.1 that the Appellant No.1/accused No.1 was already undergoing sentence in respect of two other offences in Sessions Case No.504/97 (for offences under Sections 396, 449 and 324 of the I.P.C.) and 579/97 (for offences under Sections 396, 449 and 324 of the I.P.C.). It was argued that the sentence of accused No.1 in relation to the present offence be directed to run concurrently with the sentence in relation to the said case. It is not possible to accept this submission. The question of directing sentences awarded in separate offences to run concurrently could have been considered in the context of Section 427 of the Code of Criminal Procedure, 1973. In the present case, I am of the considered view that as the Appellants have had engaged themselves in a dare devil act of entering residential house of PW 1 and used deadly weapon in the commission of offence, question of showing indulgence in such matters does not arise. Moreso, because the Trial Court has awarded minimum punishment provided by Statute in relation to offence under Section 397 r/w Section 34 of the I.P.C. Thus understood, even the argument on the point of sentence will have to be rejected.

22. Accordingly, this Appeal should fail. The same is dismissed.

23. This Court expresses word of gratitude to Mr.Arfan Sait for the able assistance given to espouse the cause of Appellants as amicus curiae.

A.M.KHANWILKAR, J.